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ARIZONA CORPORATION COMMISSION  
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**BEFORE THE ARIZONA CORPORATION COMMISSION**

IN THE MATTER OF THE COMPLAINT OF  
BUREAU OF INDIAN AFFAIRS, UNITED  
STATES OF AMERICA, AGAINST  
MOHAVE ELECTRIC COOPERATIVE,  
INC. AS TO SERVICES TO THE  
HAVASUPAI AND HUALAPAI INDIAN  
RESERVATIONS.

DOCKET NO. E-01750A-05-0579

**PRE-FILED DIRECT TESTIMONY OF ROBERT MOELLER  
ON BEHALF OF MOHAVE ELECTRIC COOPERATIVE, INC.**

Arizona Corporation Commission

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**I. Introduction.**

**Q. Please state your name, business address, and current position.**

A. Robert Moeller, 1124 East Rose Lane #9, Phoenix, AZ. 85014. Since my retirement from the Office of the Solicitor, United States Department of Interior, I have been self-employed as an attorney and consultant in the areas of Indian law, federal water law, and environmental law. In addition, I am Chief Judge to the Chemehuevi Indian Tribal Court, and an Associate Justice on the Colorado River Tribes Court of Appeals.

**Q. Please provide a brief summary of your educational and work experience.**

A. I graduated in 1968 from Arizona State University, *summa cum laude*, with a Bachelor of Arts in History. In 1971 I graduated from the University of California at Santa Barbara with a Masters Degree in Intellectual History. In 1974 I graduated with a Doctor of Jurisprudence Degree from Arizona State University College of Law (now Sandra Day O'Connor School of Law). In 1974 I joined the Office of the Field Solicitor, Window Rock, Arizona providing legal services to the Bureau of Indian Affairs on the Navajo Reservation. (The Office of the Solicitor provides legal services to the agencies within the Department of Interior.) In 1976 I transferred to the Phoenix Field Solicitor's Office and provided legal services to BIA offices serving Indian tribes along the Colorado River, Arizona, and Western Nevada. In 1997 I retired from federal service after 23 years of service and have been self employed as an attorney and consultant in addition to providing judicial services to the Chemehuevi Indian Tribe and the Colorado River Indian Tribes.

1 **Q. Please summarize any awards and honors you hold that might be relevant to the**  
2 **opinions you will be offering in this proceeding.**

3 **A.** I have received the following awards:

4  
5 Certificate of Appreciation for lecture to Arizona State University, College of Law 1982.

6 Award from Arizona State Land Department, Bureau of Land Management and Santa  
7 Pacific Railroad Company (Mohave Desert-Grand Canyon Mineral Exchange).

8 Unit Award, Bureau of Land Management, 1986.

9 Special Achievement Award, Office of the Solicitor, 1988.

10 Special Achievement Award, Office of the Solicitor, 1991.

11 Performance Award, Office of the Solicitor, 1993.

12 Star Award, Bureau of Reclamation, 1996.

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14  
15 **Q. As an attorney in the Field Solicitor Office in Window Rock and Phoenix what**  
16 **were the scope of your responsibilities relevant to your testimony?**

17  
18 **A.** For 23 years, in Window Rock and in Phoenix, I was responsible for providing day to  
19 day operational legal advice to the Bureau of Indian Affairs regarding the manifold  
20 programs which the BIA operates for the benefit of Indians on the Navajo Reservation, and  
21 the BIA operations regarding Indian tribes in southeastern California along the Colorado  
22 River, western Nevada, and throughout Arizona. This legal assistance involved advising  
23 BIA officials regarding the nature, scope, and responsibilities attendant to the trust  
24 relationship and obligations which the United States and its agencies owes to Indian tribes  
25 and individuals in the field of Indian Affairs.  
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2 **Q. Are you sponsoring any exhibits as part of you testimony?**

3 A. I have attached a list of cases which establish support for the contentions regarding  
4 the nature and scope of BIA trust obligations as will be set forth in my testimony. This is  
5 identified as Exhibit RM-1.  
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9 **II. Purpose of testimony.**

10 **Q. What is the purpose of your direct testimony in this proceeding.**

11 A. I am testifying regarding the appropriate nature and scope of the responsibility of the  
12 Bureau of Indian Affairs with regard to the provision of electrical services to the Havasupai  
13 and Hualapai Indian Tribes, and to comment on and rebut the prefiled testimony Walker and  
14 Williams. I have been asked to review the complaint, the moving papers, the salient parts of  
15 the administrative record in this case and the BIA's prefiled testimony in order to render  
16 expert opinions regarding the federal government's recognition of the obligations which the  
17 United States owes to the Havasupai and Hualapai Tribes in this case. I have also been  
18 asked to opine whether federal policy, and specifically federal policy concerning Indian  
19 Tribes, supports the exercise of state regulatory jurisdiction, acting through the Arizona  
20 Corporation Commission, over Mohave Electric with respect to this dispute.  
21  
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25 **III. BIA programs serving Indians.**

26 **Q. Can you give us a summary of the services which the BIA provides to Indian**  
27 **tribes and individuals?**  
28

1 A. The BIA's activities involve assisting Indian tribes in virtually all major areas of  
2 Indian affairs. BIA programs and services include welfare (i.e. General Assistance), law  
3 enforcement and judicial services through the BIA police and Courts of Indian Offenses as  
4 well as probate of Indian trust estates, education, housing improvement, Indian child  
5 welfare, tribal enrollment, approval of attorney contracts, administration of Individual  
6 Indian Money accounts, business development through grants and loan insurance and  
7 guarantees, regulation of grazing lands, land acquisitions and issuance of patents, land  
8 management, operation and maintenance of Indian irrigation projects, Indian electric power  
9 utilities, regulation of traders, forestry management and timber sales, construction of roads,  
10 regulation of surface and mining leasing of tribal and individual Indian owned lands, surface  
11 exploration and reclamation of lands, grants of rights of way and other land use rights,  
12 approval of contracts involving land, protection of Indian antiquities, and the fostering of  
13 tribal self-government, including review and approval of certain ordinances and  
14 constitutions promulgated by Indian tribes. During my career in government service to the  
15 BIA, I personally observed the BIA's involvement in each of these areas in Arizona and  
16 elsewhere.  
17  
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20

21 **Q. Have you had any experience working with BIA electric power utilities?**

22 A. Yes. Larger and better funded tribes will organize a tribal utility authority. For  
23 example, when I worked up on the Navajo Reservation, as early as 1974 the Navajo Tribe  
24 had created a tribal enterprise, called the Navajo Tribal Utility Authority, as an arm of the  
25 tribal government, to provide electric utility services to the reservation. However, in other  
26 instances, the BIA itself has funded and operated on an *ad hoc* basis electric utility services  
27  
28

1 for small tribes and surrounding populations. For example, the BIA operated a  
2 hydroelectric facility associated with Coolidge dam, which provided power to operate  
3 irrigation pumps as part of the San Carlos Indian Irrigation Project, and was also authorized  
4 to sell surplus power on a retail basis. The BIA also operated a utility providing electricity  
5 to Indians on the Colorado River Indian Reservation and off reservation users. Both of  
6 these utilities began as parts of irrigation projects, but grew to provide electricity to  
7 domestic and commercial customers on a retail basis.  
8  
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11 **II. BIA has discretionary authority to provide electric service to Indians.**

12 **Q. In your opinion does the BIA have authority to provide electric power to**  
13 **Indians?**

14 A. Yes, and it has done so in Arizona on many occasions and in many ways. Sometimes  
15 this authority is provided in appropriation acts or authorizations to produce power in  
16 conjunction with Indian irrigation projects. However, absent express authority, the  
17 Secretary of the Interior is given broad discretion under the Snyder Act (25 U.S.C. Sec. 13)  
18 to expend moneys for the "benefit, care, and assistance of Indians...." including "relief of  
19 distress and conservation of health...and for industrial assistance and advancement and  
20 general administration of Indian property...." This language surely includes providing  
21 essential electrical power to isolated tribes such as the Hualapai and Havasupai Indians.  
22 The BIA may expend these moneys to acquire, operate and maintain generating and  
23 transmission facilities, or it may procure, under federal procurement law, electricity from  
24 outside wholesale electric providers such as Mohave Electric.  
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1 **Q. Does the BIA have an obligation to provide electricity to Indian tribes?**

2 A. Throughout my career it has been common knowledge among BIA officials that they  
3 were charged with trust responsibilities and standards in the administration of their duties  
4 towards Indian tribes and Indian individuals. In my opinion, in the absence of a specific  
5 Congressional directive, the Secretary has discretion to assist a tribe by expending money to  
6 provide electricity. Once the BIA undertakes such a service, and particularly when that  
7 service continues long enough for Indians to become dependent on the service, the trust  
8 obligation, in my opinion, requires the Secretary to continue the service directly, or to  
9 provide a viable alternative indirectly.  
10  
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12  
13 **IV. The BIA has a trust responsibility to not abandon electrical service without  
14 providing for an alternative.**

15 **Q. What do you mean by a "trust obligation?"**

16 A. From the Nineteenth Century forward, the United States Supreme Court has  
17 characterized the relationship between the federal government and Indians as one of a  
18 guardian-ward, or a trust relationship (*Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17  
19 (1831)). The Supreme Court has recognized that the United States "charges itself with  
20 moral obligations of the highest responsibility and trust," and its management of Native  
21 American affairs must be "judged by the most exacting fiduciary standards." (*Seminole  
22 Nation v. United States*, 316 U.S. 286, 297 (1942)). This not only extends to matters  
23 involving protection and management of Indian lands and resources, but also the delivery of  
24 services to Indians. (*Morton v. Ruiz*, 415 U.S. 199 (1974)). In *Morton*, the BIA refused to  
25 provide general assistance to otherwise qualified Indians living near but not on the  
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1 reservation. The Supreme Court felt it violated "distinctive obligations of fairness" to refuse  
2 general assistance without even publishing the eligibility criteria according to established  
3 procedures.  
4

5 In this case, after providing electrical service for years directly through BIA-  
6 acquired, owned and operated gas, then diesel generating facilities, and then indirectly by  
7 purchasing electricity and its means of transmission, the BIA allowed the Contract with  
8 Mohave Electric to expire. It now seeks to abandon its responsibility to maintain the line  
9 and continue service. This is hardly consistent with the high fiduciary standards and moral  
10 obligations of the highest responsibility and trust spoken of by the U.S. Supreme Court.  
11

12 Such actions are also inconsistent with BIA's past practices. In the 1980's, Congress  
13 authorized the BIA to dispose of the electric utility system which had grown up as part of  
14 the San Carlos Indian Irrigation Project. BIA plans called for part of the system to be sold  
15 to the San Carlos Irrigation and Drainage District, the non-Indian portion of the project.  
16 Part of the system was to be sold to Arizona Public Service, that part of the system not  
17 serving project lands. And, most significantly the BIA planned to sell the on reservation  
18 portion of the system to the Gila River Indian Community. The BIA never contemplated, to  
19 my knowledge, disposing of the on-reservation portion of the system to a non-Indian private  
20 entity. The BIA always considered that the responsibility to deliver and maintain electrical  
21 service to Indian customers would remain a federal or tribal responsibility. Unfortunately,  
22 the Gila River Tribe decided at the eleventh hour not to acquire the system and the deal fell  
23 through.  
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1 Similarly, the BIA disposed of the off-reservation portion of the Colorado River  
2 Indian Tribes irrigation project's electrical component in Arizona. The BIA sold the off-  
3 reservation portion some years ago to Arizona Public Service. It did not contemplate selling  
4 the on-reservation portion of the system to a non-Indian entity. The reason, in both of these  
5 instances, is that the BIA felt that delivery of electrical services originating with the federal  
6 government remained a responsibility of the federal government, unless Congress  
7 determined otherwise.  
8  
9

10 **IV. The BIA has a trust obligation to maintain the line once it has been abandoned**  
11 **to the underlying trust land.**  
12

13 **Q. Who now has responsibility to maintain the line from Nelson Substation to Long**  
14 **Mesa after Mohave Electric abandoned and quitclaimed it to the BIA and the Tribes?**  
15

16 **A.** In my opinion, the BIA.

17 **Q. Why?**

18 **A.** Once the line (including the right of way) is abandoned, both the line and right-of-  
19 way merge with the underlying realty. That realty is reservation land held in trust by the  
20 United States of America. While it may not be true that the United States has a trust  
21 responsibility to maintain all improvements on trust lands on Indian reservations, in my  
22 opinion, it has a trust obligation to maintain this line.  
23  
24

25 **Q. Why does that obligation exist?**

26 **A.** Because the BIA undertook a contractual obligation to reimburse Mohave Electric  
27 for the cost of the line to serve the Indian community with electricity and has paid for the  
28

1 line with federal funds in fulfillment of its trust obligations. The line itself was financed  
2 with federal funds loaned to Mohave Electric. The line is now part of the corpus of the trust  
3 and in my view the BIA has a responsibility to continue to maintain the line during its life,  
4 as part of its continuing obligation to provide electricity once it has undertaken the task.  
5 One of the primary duties of a trustee is to preserve and maintain trust assets. For the BIA  
6 to fail to maintain the line is part and parcel of an abandonment of an obligation to provide  
7 electric service which it now seeks to ignore.  
8  
9

10  
11 **V. The BIA has a trust responsibility to protect the jurisdictional space of the**  
12 **Tribes and to regulate activities on the reservations, and not actively seek to surrender**  
13 **that power to a state authority in derogation of federal policy.**  
14

15 **Q. Are there other actions you see in this record that leads you to conclude that the**  
16 **BIA has failed to fulfill its trust responsibilities in this matter?**  
17

18 **A. Yes.** The courts have recognized that part of the trust responsibility of the United  
19 States is not only to preserve trust property but also protect and preserve the jurisdictional  
20 space which is the life blood of the self government of any Indian tribe. "The federal  
21 government bears a special trust obligation to protect the interests of Indian tribes, including  
22 protecting tribal property *and jurisdiction.*" (*HRI, Inc. v. EPA*, 198 F.3d 1224, 1245 (10<sup>th</sup>  
23 Cir. 2000)(emphasis added)). Here, the BIA is attempting to have an Arizona state agency,  
24 the ACC, adjudicate and regulate a transaction between the federal government and Mohave  
25 Electric arising on and relating exclusively to an Indian reservation. Rather than seek relief  
26  
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1 in federal or tribal court, which in my view would be the proper forums to hear such  
2 disputes, the United States has filed this complaint before the Commission. Such an action  
3 is clearly violative of the federal policy that disputes by non-Indians involving Indians and  
4 Indian tribes should not be heard in state forums, since to do so is an intrusion on the right  
5 of Indians to be governed by themselves. Yet, the BIA, is completely ignoring a policy it  
6 has a trust responsibility to vindicate, abandons the policy and positively invites state  
7 regulation into the jurisdictional space vouchsafed by federal law to Indian tribes.  
8  
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10  
11 **V. Conclusion.**

12 **Q. Can you summarize your testimony?**  
13

14  
15 **A.** As demonstrated in many cases, the United States has a checkered and unenviable  
16 history of attempting to avoid its trust responsibilities towards Indians. This case is just one  
17 more chapter in that sad saga. In this case it is even more outrageous because the BIA,  
18 acting through the U.S. Justice Department and the U.S. Attorney's Office, has filed a  
19 complaint, not only seeking to avoid its responsibility to provide electric service to the  
20 Havasupai and Hualapai Tribes, but to bend the Arizona Corporation Commission into  
21 forcing the private sector to fulfill this responsibility. Furthermore, a major cornerstone of  
22 federal policy for decades has been to foster and promote tribal self-government. Towards  
23 that end, the United States Supreme Court has repeatedly held that state governments (and  
24 their subordinate entities, such as the Arizona Corporation Commission) lack regulatory,  
25 adjudicatory, and taxing authority over on-reservation activities and transactions involving  
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1 Indians and non-Indians, much less the federal government itself. Completely ignoring this  
2 federal policy, and in an act of apparent desperation to avoid its federal responsibility, the  
3 BIA and Justice Department now *invite* the Corporation Commission to intrude on the  
4 jurisdictional space which is the life-blood of any tribal self-government. Four of the  
5 landmark United States Supreme Court cases cited in my Exhibit 1 involved unlawful and  
6 unsuccessful attempts by the State of Arizona to intrude on tribal sovereignty. The Arizona  
7 Corporation Commission should say "no more," and deny the relief sought in the complaint.  
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11 **Q. Does that conclude your testimony?**

12 **A. Yes.**  
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Hearing Division  
Arizona Corporation Commission  
1200 W. Washington  
Phoenix, AZ 85007-2927

Janice M. Alward, Esq., Chief Counsel  
Legal Division  
Arizona Corporation Commission  
1200 W. Washington Street  
Phoenix, AZ 85007

Mark J. Wenker, Esq.  
U.S. Attorney's Office  
40 N. Central Avenue, Suite 1200  
Phoenix, AZ 85004-4408  
Attorneys for the Bureau of Indian Affairs



## **EXHIBIT RM-1**

## TABLE OF CASES

*Cherokee Nation v. Georgia*, 30 U.S. 1 (1831)

*Seminole Nation v. United States*, 316 U.S. 515 (1942)

*Williams v. Lee*, 368 U.S. 171 (1959)

*Morton v. Ruiz*, 415 U.S. 199 (1974)

*Bryan v. Itasca County*, 426 U.S. 373 (1976)

*Central Machinery v. Arizona State Tax Commission*, 411 U.S. 160 (1980)

*McClanahan v. Arizona State Tax Commission*, 411 U.S. 160 (1980)

*United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*)

*United States v. Mitchell*, 463 U.S. 206 (1983) (*Mitchell II*)

*United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003)

*HRI, Inc. v. Environmental Protection Agency*, 198 F.3d 1224 (10<sup>th</sup> Cir. 2000)

25 U.S.C. Section 13

25 CFR Part 175